United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7600

United States Court of Appeals

FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

—against—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, AND UPON
REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR DEFENDANTS-APPELLEES AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statement of Issues Presented

This Court's scheduling order of July 6, 1979 directed the parties to address the following issues:

1. "[W]hether on the present record in the District Court, this Court is in a position to decide whether the exclusive blanket license tendered to the CBS television network by ASCAP and BMI is unlawful price-fixing and an unreasonable restraint of trade under the rule of reason or as a misuse of copyright?"

Answer: On the present record, this Court is in a position to decide the issues presented on remand from the Supreme Court.

2. "[I]f such record is inadequate, what is proposed for the further progress of the case?"

Answer: Not applicable.

3. "[I]f the record is adequate, should the exclusive tender of a blanket or program license to the CBS television network be prohibited or limited under the rule of reason, or as a misuse of copyright?"

Answer: The record makes it clear that ASCAP's offer of blanket and per-program licenses to the CBS television network does not violate the "rule of reason"; neither ASCAP nor its members are guilty of copyright misuse (Points I and II, pp. 23-38, *infra*).

4. "[I]f, under the rule of reason or copyright misuse, it should be determined that it is an antitrust violation for ASCAP or BMI to issue a blanket license to a television network for a single fee, would it necessarily be illegal to negotiate and issue blanket licenses to individual radio or television stations or to other users who perform copyrighted music for profit?"

Answer: No (Point III, pp. 38-39, *infra*).

5. "[I]f, under the rule of reason or copyright misuse, it should be determined that it is an antitrust violation for ASCAP or BMI to issue a blanket license to a television network for a single fee, would it be equally illegal for the members to authorize ASCAP to issue licenses for individual compositions based on prices determined by the copyright owners?"

Answer: No (Point IV, pp. 40-41, *infra*).

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On remand from the Supreme Court, CBS appeals from an order of the District Court for the Southern District of New York (Lasker, J.) dismissing its complaint on the merits, after an eight-week non-jury trial.

CBS commenced this action on December 31, 1969. Judge Lasker's order was entered on September 22, 1975, 400 F. Supp. 737. This Court's decision reversing the District Court was filed on August 8, 1977, 562 F.2d 130. The Supreme Court's decision reversing this Court and remanding for further proceedings was filed on April 17, 1979, 99 S. Ct. 1551.*

* For the Court's convenience, ASCAP and BMI are filing under separate cover Joint Addenda which reproduce the opinions in this case cited in the text. References to the record on appeal are preceded by the same designations used by CBS in its brief.

Preliminary Statement

In this ten-year old lawsuit, both this Court and the Supreme Court have recognized that in dealing with the licensing of music performance rights (99 S. Ct. at 1557):

> " 'we confront conditions both in copyright law and in antitrust law which are *sui generis*.' "

The prior proceedings have finally determined all but one of the *sui generis* issues presented:

(a) ASCAP and its members do *not* illegally fix prices in violation of Section 1 of the Sherman Act;

(b) ASCAP and its members are *not* guilty of illegal tying or block-booking under Section 1 of the Sherman Act; and

(c) ASCAP is *not* an unlawful monopoly under Section 2 of the Sherman Act.

To answer the one remaining question of law, "have ASCAP and its members combined, conspired or entered into contracts 'in restraint of trade or commerce among the several States' in violation of the 'rule of reason' under Section 1 of the Sherman Act?," we begin with the eight-week trial in the District Court which was addressed primarily to the "rule of reason" issue. The trial produced a lengthy opinion by Judge Lasker in which he carefully considered the parties' contentions, lined up the evidence on each side, weighed that evidence and concluded that (400 F. Supp. at 779):

> "CBS has not met its burden of proving that defendants illegally restrain trade in the market for performance rights for network television use, and compel it to take a blanket license as alleged in the complaint."

This conclusion is fully supported by the District Court's findings of fact which have been left undisturbed—in their totality—by this Court and by the Supreme Court.

Indeed, it was the District Court's finding that CBS was not compelled to take any ASCAP license which led this Court to affirm the dismissal of CBS' tying, block-booking and monopolization claims.

The Supreme Court finally adjudicated the *per se* price-fixing issue and did not decide the "rule of reason" issue. But Mr. Justice White's opinion for the Court considered the factors relevant to a "rule of reason" analysis—*e.g.*, the network television business, the market for licensing music performance rights, the origins of ASCAP and of the blanket license, the benefits of that license today to users of music, including television networks, and the effects of the alleged restraint. The Court's opinion provides considerable, and we think decisive, guidance to this Court on the issues now presented.

CBS now writes as if there never had been a trial, as if this Court had not affirmed the trial court's findings and as if the Supreme Court had said *nothing* of value on the question of the reasonableness of the present system for licensing music performance rights:

(a) CBS ignores the findings of fact and, instead, rehashes factual contentions which have now been rejected by three courts.

(b) CBS trivializes the Supreme Court's 22-page opinion by ignoring the extent to which that opinion explicitly dealt with "rule of reason" factors. Instead, CBS seeks to raise Mr. Justice Stevens' one-man dissent to the level of binding authority.

One example shows both flaws vividly. It is still CBS' major contention that ASCAP has *imposed* the blanket license on the CBS television network. CBS argues that it has had no choice but to take an ASCAP blanket license because of alleged impediments to direct licensing: lack of "machinery," the "disinclination" of ASCAP's mem-

bers to deal directly, "music in the can," etc. CBS writes (CBS Br., p. 43):

> "[T]he barriers to direct licensing, which are generated by and shelter an anticompetitive system, are themselves anticompetitive effects which must be considered in the rule-of-reason calculus.
>
> "Justice Stevens so concluded . . . ."

CBS' argument has been rejected again and again. On the precise issue of impediments or "barriers" to direct licensing, the District Court ruled that (400 F. Supp. at 779):

> "CBS has failed to prove that there are significant mechanical obstacles to direct licensing. Nor has it established by credible evidence that copyright owners would refuse to deal directly with CBS if it called upon them to do so. To the contrary, there is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license."

And, whatever Mr. Justice Stevens may have concluded, the Supreme Court majority endorsed the findings of the District Court (99 S. Ct. at 1558-59, 1564):

> "It . . . remains true that the decree [Amended Final Judgment] guarantees the legal availability of direct licensing of performance rights by ASCAP members; and the District Court found, and in this respect the Court of Appeals agreed, that *there are no practical impediments preventing direct dealing by the television networks if they so desire. Historically, they have not done so.* Since 1946, CBS and other television networks have taken blanket licenses from ASCAP and BMI. It was not until this suit arose that the CBS network demanded any other kind of license.

• • •

> "The District Court found that there was no legal, practical or conspiratorial impediment to CBS obtaining individual licenses; *CBS, in short, had a real choice.*" (Emphasis added).

When the issue of "reasonableness" before this Court is viewed against the background of the District Court's findings of fact and all prior opinions in this case, it becomes plain that CBS' present assertions are without merit.

CBS failed to prove at trial that, by continuing to offer a blanket license to CBS if CBS asked for one, ASCAP and its members have restrained trade—let alone restrained it unreasonably—when CBS has always had the "real choice" of direct licensing with ASCAP's members.

If CBS, with that real choice, freely chose an ASCAP license as its preferred vehicle for obtaining music performance rights, ASCAP and its members cannot be adjudged to have compelled CBS to take that license.

Statement of the Case

If there is one proposition that has emerged with clarity from the prior proceedings, it is that theoretical reasoning about alleged "restraints" in the complex business of licensing music performance rights does not substitute for concrete proof. CBS demands far-reaching judicial intrusion into a marketplace. Accordingly, it had the burden of proving—not theorizing—that the free operation of that market was restrained in violation of law. CBS has not borne that burden. It has come forward with no such proof.

The Parties

CBS

CBS brought this case on behalf of its television network. That network supplies programs, many of which contain copyrighted music, to some 200 local television stations. CBS also owns television and radio stations in

major cities and operates a national radio network. CBS Records is the largest manufacturer and seller of records and tapes in the world. CBS is also a leading music publisher, with publishing subsidiaries affiliated with both ASCAP and BMI.

The Supreme Court, reiterating a finding of the District Court, stated that (99 S. Ct. at 1554):

> "[CBS] is 'the giant of the world in the use of music rights,' the 'No. 1 outlet in the history of entertainment.' "

ASCAP

CBS' brief (p. 47) describes ASCAP as

> "an organization dedicated for 65 years to the fixing of price . . . ."

and (p. 33)

> "a supragovernmental taxing authority."

The Supreme Court had a rather different view. Mr. Justice White wrote (99 S. Ct. at 1554-55):

> "Since 1897 the copyright laws have vested in the owner of a copyrighted musical composition the exclusive right to perform the work publicly for profit, but the legal right is not self-enforcing. In 1914 Victor Herbert and a handful of other composers organized ASCAP because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses. 'ASCAP was organized as a 'clearing-house' for copyright owners and users to solve these problems' associated with the licensing of music. *CBS, Inc.* v. *ASCAP,* 400 F. Supp. 737, 741 (S.D.N.Y. 1975). As ASCAP operates today, its 22,000 members grant it nonexclusive rights to license nondramatic perform-

> ances of their works and ASCAP issues licenses and distributes royalties to copyright owners in accordance with a schedule reflecting the nature and amount of the use of their music and other factors."

CBS misdescribes reality when it terms the ASCAP Board of Directors a "central Committee," controlled and dominated by large music publishing corporations (CBS Br., pp. 5, 8-9). In fact, ASCAP is managed by a Board of Directors composed of 12 writer members and 12 publisher members. The writer members of the board are elected solely by the writers, the publisher members solely by the publishers. In consequence, writers and publishers each have an equal say.

BMI

BMI was organized in 1939 by the radio broadcasting industry, including CBS, to act as a music copyright licensor. Its stock is owned entirely by broadcasters. It has approximately 20,000 writer and 10,000 publisher affiliates and a repertory of over one million compositions compared with ASCAP's three million, according to the District Court's calculations.

The Amended Final Judgment

For the past 30 years, the conditioning circumstance of ASCAP's existence has been the Amended Final Judgment entered on consent in 1950 in *United States* v. *ASCAP*, [1950-51] Trade Cas. (CCH) ¶62,595 (S.D.N.Y. March 14, 1950) (amending and superseding a 1941 consent judgment). That judgment controls virtually every aspect of ASCAP's internal and external operation. Its provisions are of obvious pertinence to any "rule of reason" analysis.*

As Mr. Justice White pointed out (99 S. Ct. at 1559):

> "[I]t cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and

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* CBS has never claimed that ASCAP has violated any term of the Amended Final Judgment.

> the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further consideration, supervision and perhaps invalidation of asserted anticompetitive practices. In these circumstances, we have a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain. Thus, although CBS is not bound by the Antitrust Division's actions, the decree is a fact of economic and legal life in this industry, and the Court of Appeals should not have ignored it completely in analyzing the practice."

Under the Amended Final Judgment and the ASCAP Articles of Association and membership agreements, the "fact[s] of economic and legal life in this industry" are as follows:

(a) membership in ASCAP is open to any writer of one published song and to any music publisher — hence, all writers and publishers are guaranteed access to the markets where music is licensed;

(b) a member, upon giving three months' notice, may withdraw from membership;

(c) each member grants to ASCAP only the nonexclusive right to license performance of compositions created or published during the term of membership;

(d) no user may be denied an ASCAP license — indeed, a user obtains an ASCAP license by the very act of applying for one;

(e) ASCAP is *required* to offer all users "a non-exclusive license to perform all of the compositions in the ASCAP repertory" (Amended Final Judgment, § VI, E 130); and

(f) ASCAP is required also to offer broadcasters a "per program" license which grants unlimited access to

the ASCAP repertory but for which a fee is paid only for each program in which ASCAP music is performed. The Supreme Court wrote (99 S. Ct. at 1558):

> "ASCAP may not insist on the blanket license, and the fee for the per program license, which is to be based on the revenues for the program on which ASCAP music is played, must offer the applicant a genuine economic choice between the per program license and the more common blanket license."

The foregoing provisions guarantee that the public may hear music in the ASCAP repertory so long as broadcasters or artists wish to perform that music. ASCAP has no power to boycott any user or category of users, nor may it restrict the use of the music in its repertory in any way.

The Amended Final Judgment, however, goes even further in guaranteeing that users will be treated fairly: it regulates the fees that ASCAP may charge for its licenses. If a user is dissatisfied with a fee quoted by ASCAP and an agreement cannot be negotiated, the user has the right to have the District Court for the Southern District of New York determine a "reasonable fee" (400 F. Supp. at 744). In any such proceeding, ASCAP—not the user—bears the burden of proving the reasonableness of the fee it requests.

As the docket sheets in *United States* v. *ASCAP* show there have been many such proceedings under the Amended Final Judgment, including some initiated by CBS, some instituted by other television networks, and some instituted by industry-wide committees representing local television and radio stations. During these proceedings, the petitioners and ASCAP invariably have settled the terms of new licenses, including the fees.

Finally, ASCAP is in essence a cooperative. After deducting its operating expenses, it distributes all revenues among its members and affiliated foreign societies. Distri-

bution arrangements comply with the mandate of the Amended Final Judgment that ASCAP

> "distribute to its members the monies received . . . on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP." (E 135-34).

Thus, members receive royalty distributions only when their compositions are performed. There is no reward for the nonproductive or the inefficient.

To sum up: the present ASCAP system for licensing music performing rights, as governed by the Amended Final Judgment

> —guarantees that each broadcaster or artist wishing to perform ASCAP music may do so (and guarantees, accordingly, that the public may hear that music);
>
> —guarantees that the user may obtain judicial determination of the reasonableness of the fee he shall pay, if he is unable to negotiate a satisfactory fee with ASCAP;
>
> —guarantees the right of users to negotiate individual prices directly with copyright proprietors (in CBS' case, a "real choice"); and
>
> —guarantees to the creators of music the opportunity to be rewarded in accordance with the use of their works.

Relations between the Parties

The relations between the parties prior to the commencement of this lawsuit were described at length by Judge Lasker under the heading "The Break-Up of an Amicable Marriage" (400 F. Supp. at 753 et seq.).

The District Court found that, until CBS brought this lawsuit in 1969, it chose to participate in a licensing system which it now contends gave it no choice.

To begin, CBS and ASCAP have dealt with each other for almost half a century—beginning in 1929 when CBS took an ASCAP blanket license for a radio station.

When CBS, together with other broadcasters, established BMI in 1939, they caused BMI to issue blanket licenses. When the CBS television network was established in 1946, it sought and took ASCAP's blanket license. In 1949, when television began to show signs of serious commercial significance, the broadcasting industry, including CBS, *insisted* that ASCAP continue to offer a blanket license (400 F. Supp. at 753; Finkelstein Tr. 3610).

The relations between the parties from 1950 to the time when this lawsuit was started were described by the District Court, as follows (400 F. Supp. at 753):

> "Since 1950, CBS' negotiations with ASCAP for licenses for its television network have of course been conducted within the framework of the amended consent decree. Although, as noted earlier, the terms of the 1950 decree prohibit ASCAP from negotiating a blanket license prior to determining whether the user would prefer a per-program license, CBS has never applied for relief under the decree complaining that ASCAP insisted on blanket licenses. Nor has the court ever been required to set a 'reasonable fee' for the blanket licenses negotiated by the parties from time to time. CBS has never negotiated or held a per-program license from ASCAP or BMI for its television network and has never attempted to fulfill its music requirements by bypassing either organization and securing performance rights directly from copyright owners."

In those circumstances, CBS' decision to file the present action demanding that ASCAP be required to provide a

"per-use" license was, to say the least, somewhat abrupt. The District Court found that CBS did "not even appear to have seriously considered an available alternative to the blanket license prior to the commencement of suit" and "CBS did not even view music licensing as a business problem until immediately prior to suit" (400 F. Supp. at 754).

The Blanket License

The foregoing discussion explains why Judge Lasker concluded that (400 F. Supp. at 779):

> "We are left with the strong impression that CBS has exaggerated the risks involved in dropping its blanket license and sought a legal solution to what is essentially a business problem."

CBS continues to seek a "legal solution." It continues to insist that for ASCAP merely to make available a blanket license to a network which asks for one is somehow an actionable restraint of trade.

In holding that ASCAP's offering a blanket license to CBS is not price fixing unlawful *per se*, the Supreme Court wrote (99 S. Ct. at 1562):

> "The blanket license, as we see it, is not a 'naked restraint [] of trade with no purpose except stifling of competition,' *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963), but rather accompanies the integration of sales, monitoring and enforcement against unauthorized copyright use."

a. *The Virtues of the Blanket License*

We may go one step farther: contrary to CBS' assertions, the blanket license did not originate because of some evil, "anticompetitive" intent on the part of ASCAP's members, and it does not exist today to effectuate that intent. Here, again, the Supreme Court's opinion shows lawful origin and conduct (99 S. Ct. at 1557, 1562-63):

> "ASCAP and BMI originated to make possible and to facilitate dealings between copyright owners and those who desire to use their music.
>
> • • •
>
> "ASCAP and the blanket license developed together out of the practical situation in the market place: thousands of users, thousands of copyright owners, and millions of compositions. Most users now want unplanned, rapid and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed, as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, night clubs, and restaurants, 562 F.2d, at 136-137, n.26, and it was in that milieu that the blanket license arose."

And for television networks, too, the blanket license, according to the Supreme Court, has virtues (99 S. Ct. at 1563):

> "With the advent of radio and television networks, market conditions changed, and the necessity for and advantages of a blanket license for those users may be far less obvious than is the case when the potential users are individual television or radio stations, or the thousands of other individuals and organizations performing copyrighted compositions in public. But even for television network licenses, ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for. ASCAP also provides the necessary resources for blanket sales and

> enforcement, resources unavailable to the vast majority of composers and publishing houses. Moreover, a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established."

b. *The Blanket License as a Separate Product*

ASCAP, the Supreme Court said, is not best viewed as a joint sales agency for the individual music performance rights of its members; more accurately, it offers a separate product, the blanket license.

The Supreme Court wrote (99 S. Ct. at 1563):

> "This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product."

Then, after discussing some of the unique characteristics of the blanket license, the Court concluded (99 S. Ct. at 1564):

> "Thus, to the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material. ASCAP, in short, made a market in which individual composers are inherently unable to fully effectively compete."

The Court clearly found no problem in this circumstance, as evidenced by its footnote citation of *Chicago Board of Trade* (99 S. Ct. at 1564 n.41).

This analysis makes impossible any claim that the blanket license restrains trade unreasonably.

The Facts Relating to CBS' Claims

a. *The Alleged Evils of the Blanket License*

1. *"Economic discrimination"*

First, says CBS, because the fees under a blanket license are either a flat dollar amount or a percentage of the licensee's revenues and do not vary with the amount or kind of music used, the blanket license constitutes "economic discrimination" (CBS Br., pp. 9-10).

Thus, CBS writes in its brief (p. 9):

> "The cardinal feature of the blanket license is that the network pays the same price (a percentage of its revenues or an annual flat fee) whether it uses five compositions a year or 5,000. . . . For a blanket licensee to negotiate a direct license would mean paying twice for the same music. There is, accordingly, no direct dealing and no price competition. It's that simple."

The answer to CBS' argument is, we submit, equally simple.

Of course, it is true that, under the blanket license, the licensee pays an agreed fee for unlimited access and may perform ASCAP music as he wishes without variance in the fee. But it is also true that: (a) this is the arrangement CBS *chooses* when it opts for the blanket license in preference to direct licensing; (b) the fees have always been the result of arm's length negotiations between strong, well-advised parties; and (c) as the District Court found (400 F. Supp. at 781 n.22):

> "[T]he extent of CBS' music usage has always been a significant factor in negotiations for the fees paid on renewals of CBS' blanket license."

Most important, the Supreme Court explicitly rejected CBS' claim of economic discrimination. The Court said (99 S. Ct. at 1556-57 n.23):

> "CBS also complains that it pays a flat fee regardless of the amount of use it makes of ASCAP compositions and even though many of its programs contain little or no music. *We are unable to see how that alone could make out an antitrust violation or misuse of copyrights:* 'Sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement. . . . Petitioner cannot complain because it must pay royalties whether it uses Hazeltine patents or not. What it acquired by the agreement into which it entered was the privilege to use any or all of the patents and developments as it desired to use them.' *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 834 (1950). *See also Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969)." (Emphasis added).

2. *Discrimination against new music*

CBS' next argument is that, under the blanket license, new music written for television is the victim of discrimination vis-a-vis previously published music in that a producer using new music must pay for its creation whereas, if he uses existing music he has no creation cost—and performance of both forms of music is licensed under the blanket license (CBS Br., pp. 10-11).

There are several answers to this lament. First, the producer presumably wants the new music and is willing to pay the additional cost. Second, CBS creates the "problem" by demanding the blanket license. And, third, there is no record support for CBS' position. No CBS witness came forward with a single example of any instance in which CBS or any program producer used previously published or established works at the expense of new music.

To be sure, CBS' expert economist, who had never spoken to a creator of music, did offer his opinion that new and untried works would profit if CBS had no blanket license (Fisher Tr. 1670, 4853). This view, however, was rejected by a witness with far more expertise and knowledge about television networks. Michael Dann, for many years CBS' vice-president in charge of network programming, was called as a witness by ASCAP and testified (Dann Tr. 3302):

> "Our industry has grown based upon the assumption that the producer will always give the young person he believes in the chance.
>
> THE COURT: I understand, however, that what you are saying is that you are giving him a chance because you think he has talent in his particular field, not because he agrees to work for you at a lower level?
>
> THE WITNESS: Right. It is never a factor. There is no such thing.
>
> This is not a tonnage business. Program failure is program failure and you cannot live with it at any price. It goes off."

Finally, if CBS' argument is really a suggestion that the blanket license produces the cartel-like effect of restricting output, we have still another example of a CBS contention which has already been authoritatively rejected. The Supreme Court wrote (99 S. Ct. at 1564 n.40):

> "Moreover, because of the nature of the product—a composition can be simultaneously 'consumed' by many users—composers have numerous markets and numerous incentives to produce, so the blanket license is unlikely to cause decreased output, one of the normal undesirable effects of a cartel. And since popular songs get an increased share of ASCAP's revenue distributions, composers compete even

within the blanket license in terms of productivity and consumer satisfaction."

3. *"Disinclination to compete"*

CBS, relying on this Court's prior opinion, argues (CBS Br., p. 17) that the "blanket-only policy 'provides a disinclination to compete. . . .' " This Court, of course, did write that (562 F.2d at 139-40):

> "[T]he very availability of the blanket license itself involves the fixing of a collective price which must, inevitably, permit the individual copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete.
>
> * * *
>
> "Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete."*

These statements, we respectfully suggest, conflict with the findings of fact which were made by the District Court and affirmed by this Court. Judge Lasker found that (400 F. Supp. at 779, 781-83):

> "CBS has [not] . . . established by credible evidence that copyright owners would refuse to deal directly with CBS if it called upon them to do so. To the contrary, there is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license.
>
> * * *
>
> "CBS has failed to prove that copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them.
>
> * * *

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* Judge Moore characterized this last statement as the "majority's assumption (thus far unsupported by proof as I see it)" (Addendum 3, p. 2).

> "CBS has failed to establish that the members or affiliates of ASCAP or BMI have refused or would refuse to license their compositions on a direct licensing basis or otherwise use their collective leverage to compel CBS to license rights to music which it did not wish to license.
>
> * * *
>
> "CBS has not established that ASCAP and BMI have power to control the prices in the market for performance licenses. . . . [C]ertainly the record does not establish that ASCAP and BMI could effectively control the prices at which such transactions take place."

Another problem with this Court's earlier view is that it found in ASCAP's members a power to "choose" which they just do not have. It is the user—CBS—which has the "real choice" of whether to deal with ASCAP or the ASCAP member. Only if CBS asks for a blanket license may ASCAP offer one. It is the user—not ASCAP—who activates the licensing machinery.

If CBS chooses to ignore ASCAP and approach the individual member, there is no way in the world that the member can "*choose* the blanket license as his medium of licensing in preference to individual bargaining."

In theory, the member could refuse to deal. But the District Court found that, in the real world, ASCAP's members would deal (400 F. Supp. at 779):

> "Even assuming, contrary to the evidence, that many publishers and writers would initially adopt a wait-and-see attitude under a direct licensing system, it is clear on this record that any resistance they might manifest would quickly dissolve, and that CBS could easily fill its music needs in the meantime. The music industry is highly fragmented. There are over 3,500 publishers and many thousands of composers who are eager for exposure of their music, and well

aware that their compositions are, with rare exceptions, highly interchangeable with others. In such circumstances, for direct licensing to fail CBS would have to be met with extraordinarily coherent resistance by publishers and composers. There is no basis in the record for the inference that such a coherent response is likely to occur."

b. *The Alleged Barriers to Direct Licensing*

One last CBS factual contention requires discussion: CBS' claim that it has no "real choice" between a blanket license and individual licenses because of alleged "barriers" to obtaining individual licenses (CBS Br., p. 12).

Eight weeks of trial were consumed with proof directed at this issue. The results were a disaster for CBS. On appeal, this Court and then the Supreme Court agreed with the District Court that CBS had a "real choice"; there are no "barriers."

The District Court found (400 F. Supp. at 770):

> "The two most salient features of the television music market are the enormous value to copyright proprietors of network exposure and the markedly limited opportunities for obtaining it . . . .
>
> "The eagerness, and occasional desperation, of copyright proprietors is heightened by the fact that there are so few opportunities to win the prize. There are only three television networks . . . ."

Then, after considering "CBS' enormous power within the music industry," Judge Lasker found (400 F. Supp. at 771):

> "On CBS' own theory that composers and publishers belong to the race of economic men, it is doubtful that any copyright owner would refuse the opportunity to have his music performed on CBS, much less wish to incur CBS' displeasure."

It was against this background—the power of CBS and the incentives for creators of music to deal with CBS and not incur its displeasure—that the District Court concluded that CBS' assertions about "barriers" to direct licensing were simply not proved. This Court and then the Supreme Court agreed that CBS had "a viable alternative" and "a real choice."

As to CBS' claim that there is an absence of "machinery" for direct licensing, the District Court summarized its findings as follows (400 F. Supp. at 765):

> "Because CBS does not claim that it would commence direct licensing tomorrow (although its counsel often questioned witnesses on the assumption that it would), the relevant question is whether the relatively modest machinery required [to enable CBS to engage in direct licensing] could be developed during a reasonable planning period. The evidence establishes beyond doubt that it could."

CBS sees a "barrier" also in "music in the can." But there was no proof whatsoever offered by CBS, only an abundant use of hypotheticals to experts, designed to produce speculative answers about theoretical "hold-ups," exorbitant premiums and extravagant option prices.

CBS, for example, offered no evidence regarding the average life span of a given inventory of programs or films to which the asserted "music in the can" problem could even theoretically apply. However, since CBS' 1979 inventory of programs and films with "music in the can" is obviously a totally different inventory than existed on December 31, 1969, CBS' failure of proof means that the "music in the can" problem today—even if it exists—is of CBS' own creation. Not one CBS witness testified to a single example of any inquiry to determine if music performance rights could be obtained for a program or film CBS was negotiating to put "in the can." It would have cost CBS nothing

to make that inquiry. And then, instead of speculation, we might have had some hard proof.*

Finally, CBS has ignored the findings below that any "barriers" could be readily surmounted. The trial court suggested a number of techniques. It found (400 F. Supp. at 780):

> "There is an astonishing lack of evidence that CBS considered such possibilities, or even the feasibility of direct licensing as a general proposition before commencing suit. The fact that it did not do so does not in itself defeat its claims, but it has rendered the nature of its proof at trial largely speculative. CBS' evidence was for the most part addressed to such abstract issues as 'disinclination,' and brought out through the generous use of hypothetical questions. However it is proof of the threat of actual anticompetitive conduct, not possible 'disinclination' which violates the antitrust laws. CBS might have obtained such proof by attempting to negotiate direct licenses. The proof which it chose to offer instead, as to the alleged fear or disinclination of copyright proprietors to engage in direct dealing, is not sufficient to establish an illegal restraint of trade."

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* CBS also argues that, if it dropped its blanket license while the other two networks kept their ASCAP licenses, it would be disadvantaged in its future dealings for programs. CBS describes this disadvantage as a "music in the can" problem (CBS Br., p. 15). In truth, it is no more than CBS' repeatedly rejected claim that ASCAP's members would be "disinclined" to deal with it—and it is equally lacking in merit.

ARGUMENT

I.

ASCAP And Its Members Are Not Parties To Any Combination, Contract Or Conspiracy Which Unreasonably Restrains Trade

We have seen that, under the present arrangements for licensing performance rights, CBS has available to it an ASCAP blanket license—a license which is distinct from the separate licenses which individual members could offer and which "reduces costs absolutely" by sparing CBS the task of negotiating substantial numbers of individual licenses.*

We have seen also that the fees for the blanket license to date have been the result of arm's length negotiation between CBS and ASCAP, and that a judge of the Southern District is standing by to set a reasonable fee if the parties should be unable to agree.

Finally, we have seen that CBS has not been compelled to take a blanket license, but rather has had the "viable alternative" and "real choice" of dealing directly with ASCAP's members who would compete on a price basis, if only CBS would ask. There are no "legal, practical or conspiratorial" impediments to CBS obtaining individual licenses.

In these circumstances, there is, we submit, a threshold question to be decided: where is the combination, contract or conspiracy which unreasonably restrains trade?

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* When this case was before the Supreme Court, the Government in its oral argument noted that (Tr., p. 27):

> "At some point, the price ASCAP charges becomes sufficiently high, that it is less expensive for CBS or for anybody else to seek direct licenses. At that point, any authority ASCAP might have over price expires. So in that sense, it is clear from the record in this case that the price ASCAP is charging is less than the price that CBS would pay through direct licensing, assuming that CBS is behaving in a rational economic way."

We have shown that there is no agreement among ASCAP members, or between them and ASCAP, which restrains or limits the members' ability and willingness to deal directly with CBS. On the contrary, that right is explicitly preserved and, under the Amended Final Judgment, ASCAP is enjoined from interfering with its exercise by its members.

We have shown that the agreement by which ASCAP obtains nonexclusive rights from its members so that it may offer the separate product of a blanket license does not restrain trade, either as to individual licenses or as to the blanket license.

We have seen that there are no agreements among performing rights licensing organizations which restrain trade in the marketing of blanket licenses.

Finally, we have shown that the blanket license—which, by definition, does not become a contract until CBS agrees to its terms—does not restrain trade when CBS chooses that license in preference to the individual licenses which are freely available to it.

In *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), Mr. Justice Stevens, writing for the Court, said (435 U.S. at 691):

> "[T]he Rule of Reason has remained faithful to its origins. From Mr. Justice Brandeis' opinion for the Court in *Chicago Board of Trade* to the Court opinion written by Mr. Justice Powell in *Continental T. V., Inc.*, the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition."

We respectfully submit that, on this record, there is no way to conclude that "the challenged agreement" is anticompetitive. The blanket license came into existence to create a market, where none could otherwise exist. As Mr. Justice White noted (99 S. Ct. at 1562 n.32):

> "Because a musical composition can be 'consumed' by many different people at the same time and without the creator's knowledge, *the 'owner' has no real way to demand reimbursement for the use of his property except through the copyright laws and an effective way to enforce those legal rights.*" (Emphasis added).

The blanket license provides a service most users want; it increases economic efficiency by reducing costs even for users such as CBS for whom it is a convenience, not a necessity.

The present arrangements preserve for users the right and opportunity to deal directly with ASCAP's members.

In these circumstances, there is, we submit, no basis on which this Court may conclude that CBS has sustained its burden of proving that ASCAP and its members have unreasonably restrained trade in violation of Section 1 of the Sherman Act.

CBS attempts to discharge its burden by arguing that (CBS Br., p. 26):

(a) since there could be direct dealings for music performance rights, but there are no such dealings; while

(b) at the same time, there are direct dealings for synchronization and mechanical rights (which we concede); therefore, the only conclusion possible is that the market for performance rights is being unreasonably restrained and that ASCAP is imposing the restraint.

There are a number of answers to this argument. First, as to most users, the Supreme Court explained why there have been no direct dealings between users and ASCAP's members (99 S. Ct. at 1563):

> "A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided. Also, individual fees for the use of individual com-

> positions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing task for the copyright owner. Historically, the market for public performance rights organized itself largely around the single-fee blanket license, which gave unlimited access to the repertory and reliable protection against infringement."

This explanation, clearly, offers no support for CBS' position.*

Second, as to television networks, such as CBS, the explanation is equally simple. CBS never sought to deal directly with ASCAP's members, although there are no impediments to such dealings.

In short, the only permissible conclusion on this record is that CBS has not dealt directly for performance rights because it has viewed the blanket license, with its efficiencies, as more suited to CBS' needs. In these circumstances, the non-existence of direct dealings does not prove CBS' case.

Nor are CBS' claims aided by its arguments concerning ASCAP's "size" or by its allegation that the market for performance rights is "dominated" by two licensing organizations, ASCAP and BMI.

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* At trial, there was substantial evidence concerning the efforts of one user, 3M, to obtain direct licenses from publishers in connection with its marketing in the mid-1960's of a tape and tape player designed to provide 24 hours of background music. CBS, as the District Court found, relied heavily on 3M's experience, but not to its advantage. For the evidence showed, and Judge Lasker found, that after negotiations between ASCAP and 3M broke down, "ASCAP suggested to 3M that it deal directly with copyright proprietors" (400 F. Supp. at 772). The results of these dealings were that (400 F. Supp. at 772):

> "3M signed contracts with 27 of the 35 publishers it approached. It obtained all of the music it needed within its time schedule at a cost of about three quarters of the amount of its first offer to ASCAP."

The District Court found that, as a practical matter, virtually every copyrighted composition is in the repertory of either ASCAP or BMI. In consequence, any broadcaster or other user who wishes "unplanned, rapid and indemnified access to any and all of the repertory of compositions" so that he may freely perform whatever music his taste and interests may suggest—the prime virtue of the blanket license—need deal only with two licensing organizations, not a half-dozen or a dozen.*

Moreover, as Mr. Justice White pointed out (99 S. Ct. at 1562 n.32):

> "It takes an organization of rather large size to monitor most or all uses and to deal with users on behalf of the composers. Moreover, it is inefficient to have too many such organizations duplicating each other's monitoring of use."

Finally, on the question of "size," the Court will recall that, under the Amended Final Judgment, ASCAP has no control over its size. Membership in ASCAP is open to all creators of music who meet the most minimal of requirements, and departure depends only upon the giving of appropriate notice. The consequence of these requirements is that ASCAP may not exclude a creator of music from the marketplace where music performance rights are licensed and thus deny him the financial rewards which are his when his works are performed, nor may ASCAP prevent him from joining some other licensing organization if he so chooses.

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* The reluctance of broadcasters to deal with a multitude of copyright licensors is well illustrated in this record by evidence concerning the so-called Warner Bros. incident. CBS' brief inaccurately describes the evidence with regard to that piece of history. In point of fact, in 1935 Warner withdrew from ASCAP and sought to license its extensive catalog directly to broadcasters. The broadcasters responded by refusing to deal with Warner and they eliminated Warner music from their programs. Writers associated with Warner, including such men as Cole Porter, were understandably upset when they discovered that Warner's exodus from ASCAP had led to a broadcaster boycott of their works in radio. Eventually, Warner returned to ASCAP (Finkelstein Tr. 3706-07; Morris D 645-55).

In short, in the case of ASCAP, size is not a vice—it is the result of ASCAP's being a wholly open organization.

Finally, on the issue of "reasonableness," let us say a few words about ASCAP's contacts with the antitrust laws prior to the commencement of this lawsuit. The Supreme Court noted that (99 S. Ct. at 1557):

> "[ASCAP and BMI] plainly involve concerted action in a large and active line of commerce, and it is not surprising that, as the District Court found, '[n]either ASCAP nor BMI is a stranger to antitrust litigation.' "

CBS, perhaps on the theory that smoke will make do for fire, makes much ado about this subject.

The principal fact to be noted, however, is that ASCAP's "difficulties" with the antitrust laws ceased upon entry of the Amended Final Judgment in 1950. The decisions in *Alden-Rochelle** and *M. Witmark & Sons* v. *Jensen*** predate that judgment.*** Since that time, ASCAP has not remained a stranger to antitrust litigation,

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* *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948).

** *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949).

*** As this Court pointed out in *United States* v. *ASCAP* (*Application of Shenandoah Valley Broadcasting, Inc.*), 331 F.2d 117, 121 (2d Cir.) (Friendly, J.), *cert. denied*, 377 U.S. 997 (1964):

> "The Amended Final Judgment of March 14, 1950, considerably amplified an earlier consent judgment entered in the Government's antitrust suit against ASCAP nine years before. The 1941 judgment contained many negative injunctions with respect to licensing, but had no provision specifically addressed to television, which had not yet been developed commercially, and no provision for judicial fixing of license fees if a licensee and ASCAP were unable to agree on terms. The 1950 Judgment was designed, in part, to fill these gaps, as well as to meet the problems with respect to motion picture licensing revealed by Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948) and M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948)."

e.g., the *K-91* case* and this lawsuit, but the results have been uniform: under the present arrangements, including the Amended Final Judgment, the courts have held that ASCAP is not in violation of the antitrust laws.

The reason for this state of affairs is simple: the 1950 decree remedied whatever defects might theretofore have been thought to exist. The 1950 decree, for example, set up the machinery for judicial determination of license fees, if the user and ASCAP were unable to agree on a fee. And the 1950 decree guaranteed the right of users to deal directly with ASCAP members.**

As the *K-91* court pointed out after measuring the present licensing arrangements against the commands of Sections 1 and 2 of the Sherman Act (372 F.2d at 4):

> "ASCAP is certainly a combination, but not every combination is a combination in restraint of trade or a monopoly."

Finally, as the Supreme Court noted, Congress in the Copyright Act of 1976 "has itself chosen to employ the blanket license and similar practices" (99 S. Ct. at 1560).

* * *

And so, on the principal issue in this case, we respectfully submit that CBS has failed to discharge its burden of proof in two critical respects: it has not proved any restraint of trade, and it surely has not proved any unreasonable restraint of trade.***

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* *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968).

** The Supreme Court noted that, at the time of *Alden-Rochelle* and *Witmark* (99 S. Ct. at 1560 n.25),

> "ASCAP had barred its members from assigning performing rights to movie producers at the same time recording rights were licensed, and the theaters were effectively unable to engage in direct transactions for performing rights with individual copyright owners."

*** CBS deals with the issue of copyright misuse in a footnote (CBS Br., p. 45 n.23), and we shall do the same. The issue is: if this

(footnote continued on following page)

II.

The Present Arrangements For Licensing Music Performance Rights Are The "Least Restrictive Alternative"

A. The Legal Standard

CBS, as we have shown, has failed to prove that the present arrangements for licensing music performance rights restrain trade in any respect. On the contrary, the present arrangements are the "least restrictive alternative" because CBS has available to it the real choice of negotiating for an ASCAP blanket license or dealing individually with ASCAP's members for music performance rights.

On this record, there is no occasion for this Court even to consider CBS' proposed "per-use" license. Whenever a plaintiff in an antitrust suit merely *alleges* an unreasonable restraint of trade, he does not thereby command the courts to speculate as to how an existing marketplace might be redesigned or restructured.

Rather, CBS had the burden here of proving that there is something unlawful in the present arrangements. CBS did not discharge that burden by conjuring up the "per-use" license—something never used in music licensing anywhere in the world and never even reduced to writing. CBS

(footnote continued from preceding page)
Court should find that ASCAP is violating the "rule of reason," by making available to a television network a form of license which, among other things, it is commanded to make available by the Amended Final Judgment, should ASCAP's members be prevented from enforcing their copyrights by virtue of the misuse doctrine? The cases cited by CBS do not support its argument that ASCAP's members, in these circumstances, are misusing their copyrights so as to permit CBS to perform their music free. Instead, they suggest only that the holders of the statutory copyright or patent monopoly may misuse their copyrights or patents when they engage in illegal tying arrangements. We have seen that ASCAP and its members may no longer be accused of illegal tying or block-booking (see pp. 2-3, *supra*).

may not, merely by conceiving the "per-use" license, compel the courts to embark upon a judicial inquiry as to whether it might conceivably be a "less restrictive alternative" to the blanket license.

To put it another way: Section 1 of the Sherman Act prohibits unreasonable restraints of trade; but when a plaintiff has failed to prove any unreasonable restraint—when an existing marketplace provides that plaintiff with reasonable alternatives and a real choice—the antitrust laws should not be the justification for the courts to intrude into that marketplace.

At trial in the District Court, there was a great deal of testimony concerning the CBS "per-use" license. Judge Lasker did not deal with this evidence because he concluded that no illegal restraint had been proved and so he did not have to consider "less restrictive alternatives."

For the reasons previously stated, this Court should not search for a "less restrictive alternative." But if this Court were to do so on this record, it would find that the CBS "per-use" license is anything but a "less restrictive alternative." On the contrary, it is a scheme to obtain judicial sanction for CBS to engage in unlawful price-fixing.

B. The Record

1. *The Blanket License*

The blanket license, though not without its complexities, is reasonably straightforward and simple. The user has access to the total repertory and pays a single negotiated fee (which may, under the Amended Final Judgment, be either a flat dollar amount or a percentage of revenues). The duration and all other conditions are subjects for negotiation. The license may run for a day, a month, a season, a year, or any other agreed period. Under the blanket license, ASCAP and the user need not keep records of use.

As the Supreme Court wrote, "the market for public performance rights organized itself largely around the single-fee blanket license" because (99 S. Ct. at 1563)

> "thousands of individual negotiations, a virtual impossibility, were to be avoided"

and

> "individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses as well as a difficult and expensive reporting problem for the user and policing task for the copyright owner."

2. *Direct Licensing*

We cannot predict with precision how a direct licensing system might operate. We do know that it could operate, and that ASCAP's members would compete on a price basis. All of the witnesses at trial expected that, in such a market, machinery would develop to facilitate direct dealings. Each copyright proprietor would, of course, be free to determine how he wished to market his product: he could announce a fee schedule for any, some or all of his works which could be as simple or complex as he desired, or he could simply await a call from CBS or a program packager requesting him to quote a price or negotiate a fee for his works.

In a world of direct licensing, the terms and conditions of licensing arrangements, including price, would be arrived at as a result of negotiation between buyers and sellers dealing at arm's length and untrammeled by any judicial or regulatory constraints. For the writers and publishers —the copyright proprietors—the market would be less than perfect because in television there would be only three ultimate buyers—the three national television networks.*

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* In the District Court, it is our defense and counterclaim that CBS' market power is too great to be lawful and that the necessary remedy is dissolution. CBS, after all, is a common buying agent for

(footnote continued on following page)

3. *The "Per-Use" System*

The CBS "per-use" system is not a "less restrictive alternative" either to the existing blanket licensing system or to any predictable system of direct licensing.

a. *Coverage and Fees*

Under the per-use license, just as under the blanket license, CBS could use any, some or all of the compositions in the ASCAP repertory, whenever and wherever it desired.*

Under the CBS per-use license, the parties, or the federal court in the absence of the parties' agreement, would be required to do what ASCAP and the users of music have been able to avoid until now: the negotiation or judicial setting of what the Supreme Court called an "intricate schedule of fees and uses" (99 S. Ct. at 1563).

Although CBS professes to see a number of ways in which per-use fees could be set, one fact is clear: under any method the parties, and, in all likelihood, a federal court

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approximately 200 television stations, procuring programs to be broadcast by them. It is, moreover, a common selling agent of the advertising time and broadcasting facilities of these same stations.

And so we say that CBS, in dealing with individual creators of music, would have them at a great and unlawful economic disadvantage. The District Court has stayed consideration of these issues for a later time.

* To be sure, CBS in the past has suggested that the per-use license would only be for some "designated portion" of the entire ASCAP repertory. But insofar as CBS has ever identified the "designated portion" it wants, it has referred to the ASCAP Performed Works Index. The ASCAP Performed Works Index includes every composition in the ASCAP repertory that has ever been performed on any network television program or has shown up in the extensive survey of performances in other media undertaken for distribution purposes. The Performed Works Index, then, for CBS is the entire ASCAP repertory.

will become immersed in a task of great complexity.* For example, will the per-use fees be standard for each composition in the repertory, with the only variables being the nature of the use (*e.g.*, theme, background or feature)? Or will the per-use fees differ for each composition, a different fee for "White Christmas" than for lesser known works? Will ASCAP set the fees—and, if so, with or without consultation with its members? Will each member set his own fees? What about the members of foreign societies? Will fees be set for all works in the repertory?—CBS does, after all, demand access to the entire repertory. What role will the judiciary play in setting the fees? No matter how the fees may be set or who may set them, how many variables will be taken into account—*e.g.*, type, duration and popularity of the composition; time of day; season of year; number of stations in the network lineup; the prospective ratings for the program; the artist giving the performance; etc.?

b. *Guaranteed or Ceiling Prices*

CBS contends that these questions are merely "details of relief" (CBS Br., p. 48). We say they are not—for the simple reason that it is the "cardinal feature" of the CBS per-use proposal that the per-use fees will become guaranteed or ceiling prices, against which creators of music will be compelled to bid if they desire to have their works performed on the CBS television network.

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* CBS, at times, has suggested the per-use schedule need not be any more complicated than the factors now used in the ASCAP distribution system. CBS would take us through the looking glass—for only in a looking-glass world could it occur to anyone that the basis used by ASCAP for distributing to members amounts received under blanket licenses can serve as the basis for per-use license fees. ASCAP's members are willing to treat their works as fungible for distribution purposes under the present system, because that has been found to be the only way to avoid subjective judgments by ASCAP of the value of individual compositions. In a per-use world, however, ASCAP members are entitled to the view that particular works are worth more—or less—than other works.

Under the CBS scenario:

The per-use license will make available to CBS large amounts of music, with a high degree of fungibility, all at some guaranteed price. Armed with that license and its fixed prices, CBS or its producers will approach copyright proprietors for direct licenses at prices below the guaranteed prices. The copyright proprietors will either grant such licenses, or they will not have their music performed on the CBS television network. CBS will be saying to the copyright proprietor: "We have a license to your music, and to lots of other music we can use in place of your music, and we have it all at a guaranteed price. If you want *your* music to be used, you must bid against that price."

Mr. Sipes, the CBS vice-president in charge of business affairs in 1969, confirmed with candor that this is indeed the scenario CBS contemplates in a per-use world. He testified, "the only reason I would go to a copyright proprietor would be to attempt to get a lower price" (Sipes Tr. 198-99).

Such, then, is the system which CBS now asserts is a "less restrictive alternative."

At trial, Mr. Salvatore Chiantia, the head of the music publishing subsidiaries of MCA, a preeminent producer of television programs and feature films, testified about the guaranteed, ceiling price feature of the per-use license. We quote his testimony because of the vivid way in which it illustrates the poverty of CBS' claims. He said (Chiantia Tr. 2916-17):

> "I don't understand your system of competition. I will tell you what I understand by competition. . . . That means to me one thing. I get as much as I can for my songs and you pay as little as you can. That is competition to me. I don't believe that any system in which I am trammeled in any way is competition.

> If I am going to be trammeled, you be trammeled to the same extent. Let's talk about competition. Don't take a license from ASCAP. Don't take a license from ASCAP at all and come directly to me for a license. Do you think for a moment I am not going to talk to you? Do you think for a moment I am not going to talk to you seriously about getting on your network? Of course I am. But I don't like a system where I have a ceiling that I have to compete against. You have established a ceiling. And according to that, you want to come back into court and renegotiate and lower the ceiling on the basis of your experience.
>
> "I don't want to bid against a ceiling. Why not you bid against the ceiling? Why don't I put a ceiling on it and you bid against it?"

The ultimate charm of the CBS per-use proposal is that the guaranteed prices would be ever-declining guarantees. For CBS has made it clear that it would expect whatever per-use fees were set initially would be *judicially* adjusted to reflect the price established in direct licensing transactions occurring outside the per-use license. Since, as Mr. Sipes testified, the only direct licensing transactions would always be at prices below the per-use fees, any adjustment would always be downward, creating a new and lower guarantee for the next round of direct licensing transactions.

CBS' latest brief (pp. 46-47) provides conclusive proof that CBS' per-use system, in any of its variations, is not designed to bring into being a free, competitive market. Thus, CBS, in response to question No. 5 of this Court's scheduling order of July 6, 1979, argues that a system in which ASCAP was authorized to quote per-use fees that were "list" prices set by each ASCAP member would not be illegal *provided* certain "safeguards" were required. The first such "safeguard," according to CBS, should be that copyright owners remain free "to license directly at

negotiated prices." Otherwise, "the system would amount to a conspiracy not to sell at any price, other than 'list.' "

Moreover, says CBS (CBS Br., p. 47):

> "[T]he district court would have to scrutinize the operation of this system with extreme care, for it would dangerously systematize the opportunity for collusion."*

CBS' meaning is clear: under any per-use system, CBS wants the unrestricted right to use each member's works at guaranteed per-use fees, coupled with the opportunity to "persuade" the member that, if he wants his work performed, he must license at a lower fee.

Our objection to the ceiling price feature of the per-use license should not be misunderstood: it is not that sellers are competing on a price basis, are bidding against each other and are cutting their prices in response to market conditions. In a direct licensing world, ASCAP's members *would* compete on a price basis, bidding against each other. Our objection is that, in a per-use license world, CBS could compel an ASCAP member to bid against a guaranteed price—on peril of not having his music performed.

c. *The Right of Withdrawal*

The only answer CBS has ever come up with to avoid this obvious anti-competitive effect of its "less restrictive alternative" is the so-called right of withdrawal. In its latest version (CBS Br., pp. 35-36):

> "[A]n ASCAP per-use license could not possibly exert a ceiling price effect on songs that the publisher had not authorized ASCAP to license for television network use; and the publisher's right to

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* We may readily appreciate the eagerness with which a federal judge will undertake the task of scrutinizing "with extreme care" the pricing decisions of thousands of copyright proprietors to determine if they are colluding.

withdraw any song, and negotiate whatever price he chose, has been a feature of the per-use proposal from the outset."

CBS' answer is no answer at all. The right of withdrawal is by no means clear.* But this is clear: if ASCAP's members exercised the right to any meaningful degree, CBS would promptly consult its lawyers, presumably to find a remedy. CBS' witnesses so testified (Sipes Tr. 175; Stanton Dep. 215).

CBS, in short, has no intention of ever allowing the right of withdrawal to be meaningful. How could it, when a meaningful exercise of that right would place CBS in the position it says is intolerable—a direct licensing universe.

III.

If This Court Holds That ASCAP And Its Members Unreasonably Restrain Trade, That Holding Will Not Necessarily Invalidate The Issuance Of Blanket Licenses To Other Users

It is, of course, our argument that the present arrangements for licensing performance rights do not violate the antitrust laws in any respect and, in particular, that they do not constitute an unreasonable restraint of trade.

If this Court should disagree, however, a holding that the present arrangements are unlawful as to the CBS television network would not necessarily mean that such arrangements were unlawful as to other users such as

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* There is, for example, the question of when the right of withdrawal could be exercised. CBS does not propose that the right could be freely exercised at any time (CBS' Proposed Findings to the District Court, pp. 117-18). Indeed, CBS would prohibit its exercise once the producer of a CBS program selected a work for use on that program. Thus, the right could be exercised by an ASCAP member only when CBS, or its producers, had no need to obtain a direct license for the member's music.

individual radio or television stations. There is very little in this record concerning market conditions for the licensing of performance rights to broadcasters other than CBS. In these circumstances, what this Court might say about the reasonableness of the present arrangements for the marketing of performance rights to the CBS television network would not necessarily apply to other users.

We may note, however, that CBS argues, in response to question 4 in this Court's scheduling order of July 6, 1979, that the blanket license restrains competition with regard to *any* user because it "forecloses price competition," achieves "economic discrimination" and "gives rise to barriers to direct licensing" (CBS Br., pp. 45-46). We, of course, do not agree that any of CBS' arguments have merit—but if this Court should find for CBS, *on its theory of the case*, we agree that holding would apply to all users.

CBS contends, however, that such a holding would not necessarily invalidate the blanket license for all users because, in each case, the user would have to show "perfectly feasible, less restrictive alternatives" (CBS Br., p. 46).

The problem with this argument is that if the only issue that remains open when a user sues ASCAP is the issue of a "less restrictive alternative," there is only one limitation on the number of lawsuits that will be commenced by users curious to see if they can really get something for nothing—the imagination, or lack thereof, of users and their lawyers in devising some special forms of license "less restrictive" than the blanket license.

We already have two such lawsuits in the Southern District: *Buffalo Broadcasting Co.* v. *ASCAP,* 78 Civ. 5670 (S.D.N.Y., filed Nov. 27, 1978), a purported class action on behalf of the local television industry seeking an ASCAP license which excludes "pre-recorded" material, and *Alton Rainbow Corp.* v. *ASCAP,* 78 Civ. 352 (S.D.N.Y., filed March 2, 1977), a class action on behalf of so-called religious radio stations seeking some form of per-piece licensing.

IV.

It Would Not Be Unlawful For ASCAP's Members To Designate ASCAP As Their Agent Or Broker For The Negotiation Of Individual Licenses

ASCAP's members today grant ASCAP only the non-exclusive right to license public performances via the blanket and per-program licenses. They are free today to license directly or to designate some licensing agent to perform that task for them. Accordingly, if it should be determined that it is an antitrust violation for ASCAP to issue blanket or per-program licenses to the CBS television network, ASCAP's members would be free—and it would not be illegal for them—to designate ASCAP as their agent or broker for negotiating direct licenses based on prices determined by the members. Whether they would do so, and whether ASCAP would perform that function if only some members wanted it to do so, are two additional questions which cannot be answered on this record.

CBS says (CBS Br., pp. 46-48), in response to question 5 in the Court's scheduling order of July 6, 1979 that a *per-use system* in which ASCAP was authorized to quote per-use fees that were "list" prices set by each member would not be "inherently unlawful" provided certain "safeguards and conditions" were added.

Among the "safeguards and conditions" are the following:

(a) copyright owners would have to be free to license directly at negotiated prices (or else, as we have shown, CBS might not be able to take advantage of the guaranteed price feature of the per-use license);

(b) the blanket license alternative would have to be eliminated; and

(c) a federal judge would have to be standing by to scrutinize "with extreme care" the operation of the system so as to prevent collusion.

The CBS scheme, we respectfully submit, is blatantly unlawful. It has the same anti-competitive features of every other variation of the per-use license.

Moreover, if CBS would have this Court enjoin the issuance of the blanket license and compel the conversion of ASCAP into a common agent for the purpose of issuing per-use licenses, the CBS scheme would coerce ASCAP's members in a way that is unlawful. The Supreme Court wrote (99 S. Ct. at 1561 n.28):

> "Surely, if ASCAP abandoned the issuance of all licenses and confined its activities to policing the market and suing infringers, it could hardly be said that member copyright owners would be in violation of the antitrust laws by not having a common agent issue per use licenses. Under the copyright laws, those who publicly perform copyrighted music have the burden of obtaining prior consent."

Under the CBS scheme, the federal court would eliminate ASCAP's licensing function, but would then compel ASCAP's members to continue that organization as a common agent to issue per-use licenses.

We do not understand how this Court can order ASCAP's members to do something which the Supreme Court has said they can lawfully refrain from doing.

CONCLUSION

We respectfully submit the order below should be affirmed.

Respectfully submitted,

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